United Nations AT/DEC/1172

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1172

Case No.1264: LY Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Ms. Jacqueline R. Scott; Mr. Dayendra Sena Wijewardane;

Whereas, on 10 September 2002, Amadou Abdoul Ly, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application requesting the Tribunal:

7. With respect to competence and procedure ...

...

(c) *to decide* to hold oral proceedings ...

8. On the merits ...

(a) *to rescind* the decision of the Secretary-General taking no action on the Applicant's appeal and specifically refusing to reassign him to an appropriate post;

(b) *to order* that the Applicant be reinstated in service and assigned to a post commensurate with his experience and qualifications until his retirement in June 2006;

(c) *to find* that the [Joint Appeals Board [(JAB)] erred as a matter of law and equity in failing to provide appropriate and adequate compensation for the harm done to the Applicant for violation of his rights ...

(d) *to award* the Applicant compensation in the amount of three years' net base pay for the actual, consequential and moral damages suffered ...

(e) *to fix* ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(f) *to award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 18 December 2002 and once thereafter until 31 January 2003;

Whereas the Respondent filed his Answer on 29 January 2003;

Whereas the Applicant filed Written Observations on 15 July 2003;

Whereas, on 13 May 2004, the Applicant submitted an additional communication;

Whereas, on 25 June 2004, the Respondent submitted comments on the Applicant's Written Observations;

Whereas, on 25 June 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the Applicant's employment history as set out in the report of the JAB in the case is as follows:

"[The] Appellant entered the service of the UNDP as a National Programme Officer in Dakar, Senegal in 1975. ... He was subsequently assigned to UNDP Chad as Programme Officer (1977), to UNDP, Liberia as Assistant [Resident Representative (ResRep)] (1979), and to UNDP Headquarters (1982) as a Regional Projects Officer. In 1983, he was granted a permanent appointment. In 1985, he was named Deputy ResRep in Zaire. He was promoted to P-5 in 1991. That same year, he was appointed ResRep/Resident Co-ordinator (RC) in Rwanda. From May to August 1994, he served as Chief of the East Africa Division a.i. at UNDP Headquarters. From 1994 to 2000, he was [ResRep/Resident Coordinator (RC)] in Togo. He was promoted to the D-1 level in 1997. In February 2000[, while on unassigned status,] he was assigned as Officer-in-Charge [(OiC)] of UNDP and RC, a.i., in Namibia. On 1 December 2000, Appellant was put on special leave with full pay (SLWFP) ... [The Appellant separated from service on 14 January 2003.]"

Whereas the facts in the case are as follows:

On 19 May 1999, the Applicant's supervisor completed the relevant parts of the Applicant's performance appraisal report (PAR), recommending that his overall performance be rated "3" (fully satisfactory). This PAR was was subsequently sent to the Management Review Group (MRG) for finalization. On 24 December, the Applicant's new supervisor, the new Director of the African Bureau, UNDP, submitted revised comments and a special report to the MRG, recommending that his performance rating be downgraded from "3" to "4" (needs improvement in some areas). On 23 August 2000, the MRG decided to maintain the

original rating of "3", but added, in Section 10 (I) of the PAR that "the meeting noted, however, that the staff member should be reminded of the need to adjust his management style, with a view to strengthen people management skills".

On 18 August 2000, the Office of Human Resources, UNDP, (OHR), informed the Applicant that at a meeting of the Executive Team, chaired by the Administrator, UNDP, to select candidates for the RC Assessment Center, "[his] name was endorsed for the exercise to be held in Pittsburgh in September/October 2000". The Applicant was further advised:

> "[I]f you are successful in the RC Competency Assessment Programme, you will be at the disposal of the Administrator to be placed by him in any [ResRep/RC] post that he deems appropriate in the corporate interest, including those vacancies to be reviewed in the upcoming [ResRep/RC] 2001 selection exercise. While your preferences for [ResRep/RC] assignments will be taken into account as much as possible, ultimately you will be expected to serve where required. Your acceptance to participate in the Assessment Center is, therefore, on the understanding that you accept the above terms."

On 28 August 2000, the Applicant replied to OHR and announced that he would be leaving Namibia on 4 September for home leave to Senegal, following completion of his assignment in Namibia.

In a letter to the Administrator dated 31 August 2000, the Applicant requested administrative review of the decision that he undertake a competency test for ResReps in the United States, on the grounds that it seemed to "subject [his] reassignment as [ResRep] to [him] undergoing the said competency test". He added that he contested the decision on the grounds that

> "being a permanent staff member with over twenty five years of succesful service, including ten years as [ResRep/RC] with a good performance and many commendations, [he did] not think this decision [was] a just and equitable treatment of [him]".

On 28 November 2000, the Applicant lodged an appeal with the JAB in New York.

On 30 November 2001, OHR wrote to the Applicant, who, at the time, remained on unassigned status receiving salary and emoluments based on Togo. OHR advised the Applicant that his participation in the RC competency assessment was still a condition for future assignment; that, in the current environment of downsizing and post reduction in UNDP every effort would be made to place staff that were unassigned, especially those on

permanent appointment and that as an affected staff member he would be given six months (until 31 May 2002) to undertake, with OHR support, an active search for suitable placement; that, if such search was unsuccesful, he would be separated from service; and, that, during the six-month period, he would be placed on special leave with full pay (SLWFP) in Senegal.

The JAB submitted its report on 30 April 2002. Its considerations and recommendation read, in part, as follows:

> "*Considerations*
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> 13. The documents supplied by Respondent in response to the Panel's request of 24 January 2002 provided information crucial to the Panel's consideration. They made clear that the introduction of the competency assessment programme had been under consideration for some time before Appellant had been 'invited' to attend, that the programme would be phased in over a period of two or three years, and that transitional measures were contemplated. In the Panel's view, the competency assessment programme - as revealed by these documents - was a considered and well designed piece of work. Unfortunately, the same could not be said for Respondent's reply; had these documents, or - better still - the relevant extracts, been made available with Respondent's reply, a great deal of time would have been saved.
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> 14. If, as it was decided from the outset, that eventually all sitting and/or former [ResRep/RCs] would have to go through the Assessment Centre, then someone would have to be first. And if all would have eventually to go, then it would clearly have been impossible managerially to allow the first designated to refuse.
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> 15. It was acknowledged by Respondent that Appellant was the only former or sitting [ResReps/RC] invited to the competency assessment session held in the autumn of 2000. In that sense, he was 'singled out'. Had UNDP then decided to penalize him for his refusal, he might have had an appeal based on the principle of acquired rights. However, UNDP, instead, put Appellant on special leave with full pay at his home in Senegal. The United Nations Administrative Tribunal has held that an appeal must show imminent or actual injury. In the Panel's view, Appellant suffered no harm from an extended period of SLWFP. It also agreed that UNDP's requirement that Appellant participate in the competency assessment was reasonable and consistent with the policy adopted for that programme.
>
> *Recommendation*
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> 16. The Panel makes no recommendation with respect to this appeal."

On 15 May 2002, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB's findings and conclusions and had decided to accept the JAB's unanimous recommendation and to take no further action on his appeal.

On 30 May 2002, OHR notified the Applicant that his appointment would be terminated, effective 15 June 2002; that he would receive three months' salary in lieu of

notice, unless he wished to serve the three-month notice period; and, that he would receive termination indemnity for abolition of post and staff reduction in accordance with Annex III of the Staff Regulations and Rules. Notwithstanding this, he was given two further options: (a) to apply for agreed separation, with an additional 50% in termination indemnities: or, (b) to be placed on special leave without pay for a period of up to one year in order to continue his search for a suitable position with UNDP. On 3 June, the Applicant opted to serve the period of the three-month notice and accrued leave.

On 10 September 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Both the findings of fact and the conclusions drawn by the JAB are seriously flawed.

2. The Applicant objected to the competency assessment evaluation because it ignored his entire record of service and placed him on an equal footing with external candidates, and because it was applied in a discriminatory manner.

3. The Respondent failed to apply in good faith the established policies for placement of staff with respect to the Applicant.

4. The Respondent's failure to uniformly apply the new procedure for the evaluation of internal candidates for available vacancies violated the Applicant's acquired rights.

5. The handling of the Applicant's reassignment violates the letter and spirit of the Staff Regulations and Rules.

Whereas the Respondent's principal contentions are:

1. The Competency Assessment Programme was designed to enhance the functioning of the Resident Coordinator System in accordance with relevant policies adopted by the General Assembly and other relevant United Nations administrative bodies.

2. The Administrator's decision that the Applicant should participate in the Competency Assessment Programme prior to reassignment was properly taken in accordance with established procedures, and was not vitiated by discrimination, prejudice or other extraneous motives.

3. The Administrator's decision that the Applicant should participate in the Competency Assessment Programme did not violate the terms of the Applicant's contract of employment or the Applicant's acquired rights.

4. The Secretary-General has wide discretion in reassignment when connected with reorganization, and the UNDP restructuring process which finally resulted in the termination of the Applicant's appointment was an exercise of managerial prerogative, free of improper motivation or other extraneous factors.

5. The Administrator, UNDP, made all reasonable efforts to give the Applicant the possibility of reassignment at his level in accordance with the new prevailing policies and procedures and taking into account the Applicant's PARs.

The Tribunal, having deliberated from 25 June to 23 July 2004, now pronounces the following Judgement:

I. The main issue in the present case is whether the Applicant's rights were violated when he was required to participate in the RC Competency Assessment Programme as a condition for placement by the Administrator in a ResRep/RC post. A second issue in the case is whether the Administration made a *bona fide* effort to find the Applicant another ResRep/RC position in accordance with staff rule 109.1 (c).

The Tribunal notes that the Applicant's request for reinstatement in service and assignment to a post "commensurate with his experience and qualifications until his retirement in June 2006" was not the subject of an appeal to, or recommendation from, the JAB. In particular, the Tribunal notes that the JAB report is dated 30 April 2002 and that the letter advising the Applicant that his contract would be terminated is dated 30 May 2002. The Tribunal recalls in this regard Judgements No. 624, *Muhtadi* (1999) and No. 1010, *Kanj* (2001), where it held that:

> "... these matters were not before the JAB and in the absence of an agreement to submit them to the Tribunal, they are not receivable by the Tribunal. The Tribunal concludes that issues concerning the Applicant's promotion and evaluation are not properly before it, not having been considered by the JAB."

The Tribunal is satisfied that the same conclusion applies to the Applicant's plea regarding his reinstatement and future assignment in the instant case.

II. As concerns the first issue raised by this case, the Tribunal is satisfied that the answer may be found at a time prior to the events that led to the Applicant's separation from service, when, the Tribunal is persuaded, a turning point in his career occurred. It was the time the new Director of the African Bureau was appointed, in 1999, while the Applicant

served as ResRep/RC in Togo. In 1998, the Applicant received a positive performance assessment from his then supervisor. Following a delay in finalizing the Applicant's PAR for 1998, this new Director, as the Applicant's new supervisor, provided the MRG with revised comments and a special report in an attempt to persuade the MRG to downgrade the Applicant's PAR for the year 1998, going from a "3" (fully satisfactory) as rated by the original supervisor to a "4" (needs improvement in some important areas), despite the fact that she had not supervised the Applicant for the main part of the performance period covered.

III. The new Director also included several remarks in the 1998 PAR which were rather general and some of them more of a rather subjective nature. The Tribunal does not intend to substitute its own judgment for that of the supervisor, but it must evaluate the circumstances of the case to determine whether a discretionary decision, such as this one, has been tainted by prejudice, discrimination or improper motive. (See Judgements No. 613, *Besosa* (1993); and, No. 1122, *Lopes Braga* (2003).) At the same time, the Tribunal has consistently recognized that the burden of proving such prejudice or improper motive is on the Applicant implying a breach of the due process of law, arbitrariness or other extraneous motivations (see Judgement No. 834, *Kumar* (1997)). In this regard, the Tribunal cannot but notice that the supervisor's evaluation of the Applicant's performance is not commensurate with the several preceding evaluations of the Applicant's work, which are of a rather laudatory nature. In particular, the Tribunal has found the supervisor's evaluation to fly in the face of previous references to the Applicant's performance, and precisely in relation to his Rwandan tenure of office, to which period the new supervisor referred when she made her critical remarks:

> "From the outset, it should be stated that the staff member is suffering from an image problem resulting from his tenure when Resident Representative in Rwanda when the major crisis erupted there. The UNDP HQ's perception of a non-efficient handling of the Rwandan crisis still lingers on when addressing the performance of the staff member."

The Tribunal cannot hide its astonishment when comparing this highly negative vision of the new supervisor with the evaluation of the Applicant's performance by his prior supervisors in connection with his service in Rwanda, the former being directly contradictory to the latter.

IV. In 1994, the "Management Review Comments" in Section 10 (i) of the Applicant's PAR stated:

> "The MRG commended the staff member for his strong leadership capacity in coping with a situation of high tension and his ability to provide the environment for

> team-building. He also motivated his staff, both national and international through counselling and coaching."

Moreover, the MRG made the following remarks about the Applicant's performance in Rwanda:

> "]T]he MRG agreed that [the Applicant's] performance in 1993, under the conditions in the country, exceeded expectations. Considering the consistent high level of performance and the results achieved during his two years in Rwanda, the MRG agreed on a '2' rating [Exceptional, frequently exceeded expectations] and a recommendation for promotion to the D-1 level."

Also, in April 1994, the Applicant received a letter of appreciation from the Administrator, UNDP, which begins by saying "I am writing to express my deep appreciation for the work you have done before and during the present crisis in Rwanda" and continued to express the sender's appreciation of the way in which the Applicant had dealt with the difficult situation in that country, as well as his "steadfast and brave spirit". All this, needless to say, places the Applicant rather far from the lethargic spirit attributed to him by the later supervisor. Moreover, when the Applicant was serving in Togo - that is, after his tenure as ResRep/RC in Rwanda - he was promoted to D-1, which seems to flatly contradict the "perception" attributed by the later supervisor to the UNDP HQ, "of a non-efficient handling of the Rwandan crisis". Finally, a later amendment was made to Section 4 of the Applicant's PAR for 1994, acknowledging that several details of the Applicant's contributions with regard to initiating and re-starting programme activities in Rwanda had been insufficiently acknowledged.

V. In 1999, the MRG, when reviewing the Applicant's PAR for 1998 in light of the special report presented by the Applicant's supervisor and the Applicant's response thereto, endorsed the rating of "3", that is, "fully satisfactory", instead of the "4" rating (needs improvement in some important areas) the supervisor had proposed. However, the MRG added a comment which may have caused the Applicant considerable damage: "The meeting noted, however, that the staff member should be reminded of the need to adjust his management style, with a view to strengthen people management skills". This remark also runs counter to evaluations of only a few years earlier, like the one quoted above referring to the Applicant's "ability to provide the environment for team building" and stating that "he also motivated his staff, both national and international, through counseling and coaching". In this regard, the Tribunal does not dismiss the possibility that the MRG intended to achieve

a compromise which would balance the rating of the original supervisor with that suggested by the new supervisor, so as not to undercut her authority.

VI. Nevertheless, before the actual signature of the revised MRG comments in Section 10 (I), the supervisor seized another opportunity to downgrade the Applicant's performance rating, as evidenced by her letter of 24 December 1999, attaching the revised MRG's remark, and making the following recommendation: "With these comments it should be possible to give [the Applicant] a rating 4, as his performance, over a period of several years have [sic] not shown a marked improvement in certain crucial areas, is not fully satisfactory". The Tribunal, however, can find no evidence in the record that the Applicant's PARs reflected the important deficiencies in his performance the supervisor appears to have detected.

VII. The Tribunal believes that the important position held by the supervisor (she was the Director of the African Bureau) might very well have been the cause of both the MRG's comment above and the negative attitude ultimately displayed by the Administration towards the Applicant. The Tribunal's attention is drawn to the second sentence of the "*Conclusion*" (VI), of the supervisor's special report on the Applicant's performance:

> "As an experienced Resident Representative, his tendency to focus on form, status and entitlements rather than functions and results does not augur well in his favour when compared with Resident Representatives of less experience working under similarly difficult circumstances".

This seems to have turned out to be a self-fulfilling prophesy. In any case, there appears to be no doubt that both the low opinion of the supervisor as well as the remark in Section 10 (I) of the MRG quoted above, negatively influenced the decisions taken with regard to the Applicant and perhaps were the underlying reason to single him out as the first sitting/former ResRep/RC to undergo the assessment exercise.

VIII. In light of the events described above, the subsequent measures taken with regard to the Applicant have the appearance of persecution: he is singled out among sitting or former ResRep/RC staff members to participate in the efficiency test; he is sent home on SLWFP for long periods of time; and, finally he is separated from service, before having reached retirement.

The Tribunal takes particular note of the fact that the Applicant - who had been on unassigned status as of February 2000 - was the first staff member at his level (D-1) to be selected for the competency assessment, and that after his refusal to participate, he was sent to

his home country on SLWFP, where he remained, without further assignments, until he separated from service in 2003. The Tribunal is satisfied that, as pointed out by the Administration, "somebody had to be the first" but is of the view that it would have been much more preferable - and shown a spirit of equanimity towards the Applicant - if a number of other, similarly situated staff members had been selected to attend the assessment center at the same time. As it was, not only was the Applicant "the first one" to be selected, but in the years 1999/2000 - during which the negative attitude of the Administration towards the Applicant was at its lowest point - at least 14 staff members were either appointed or reassigned in UNDP offices in Africa at the ResRep/RC level, and none of them was submitted to any test prior to assignment. Moreover, at least two of them had never been ResRep before: this assertion of the Applicant is not contradicted by the Respondent.

The decision to make the Applicant's reassignment dependent on the efficiency test was tantamount to his separation: the Administration refused to even consider him for placement to any of the posts to which he was recommended by the Inter-Agency Advisory Panel (IAAP), unless he participated in the assessment, and the Tribunal concludes that the Applicant's rights were violated by the Respondent's actions.

IX. The Tribunal now turns to the other issue, namely the *bona fide* effort required from the Administration to protect a permanent staff member in case of abolition of post or reduction of staff, and thus to find the Applicant a new position. The Tribunal notes that staff rule 109.1 (c) provides:

> "*Abolition of posts and reduction of staff*
>
> (i) ... if the necessities of the service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, and staff members with probationary appointments shall be retained in preference to those on fixed-term or indefinite appointments, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service. Due regard shall also be had to nationality in the case of staff members with no more than five years of service and in the case of staff members who have changed their nationality within the preceding five years when the suitable posts available are subject to the principle of geographical distribution."

The Tribunal notes in this regard Judgement No. 679, *Fagan* (1994), where it reaffirmed that, as the holder of a permanent appointment, the Applicant was entitled to benefit from the provisions of staff rule 109.1(c), and

> "referred repeatedly to the application of this provision, which is vital to the security of staff who, having acquired permanent status, must be presumed to meet the Organization's requirements regarding qualifications. In this connection, while efforts to find alternative employment cannot be unduly prolonged and the person concerned is required to cooperate fully in these efforts, staff rule 109.1(c) requires that such efforts be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation."

The Tribunal is not impressed by the Respondent's assertion that such *bona fide* effort was made by UNDP to place the Applicant in an appropriate position. Actually, several recommendations of the IAAP were ignored by UNDP on the ground that the Applicant had refused to attend the competency center. The fact that UNDP's Regional Bureau for Africa had arranged for a one-time visit to New York to facilitate his search and OHR had arranged a series of appointments for him to explore suitable opportunities both within UNDP and within the United Nations system was not sufficient to meet the requirements of staff rule 109.1(c). The Tribunal finds that this does not counterbalance placing the Applicant on leave in his home country where he had no direct contact with UNDP. UNDP hampered his job search in express contradiction to its promise to work with him to help him identify possible opportunities. In short, UNDP did not consider placing the Applicant in any post without him having fulfilled the requirement of going through the assessment exercise.

X. The Tribunal also questions the practice of placing staff members like the Applicant on SLWFP for a prolonged period of time. The Tribunal cannot but consider that putting staff on SLWFP for more than two years amounts to a form of abuse and, in addition, is a waste of the Organization's money which should not be tolerated. According to the Tribunal, a staff member is greatly harmed when confined to staying home without duties or office, resulting in a loss of self respect and morale. It seems clear to the Tribunal - as it must have to the Applicant - that placing him in that position was a way en route to separation, which indeed occurred, and the Tribunal cannot but come to the conclusion that he must have experienced considerable anguish. The Applicant was entering his final years with the Organization, which should have been the crown of his achievements, looking forward to a satisfactory retirement and knowing that he had had a respectable career. Certainly, he could not have foreseen that his service would be cut short in such an unpleasant manner, with less retirement benefits than he might reasonably have expected.

XI. The Tribunal finds that the Applicant was discriminated against because UNDP was unwilling to consider him for any future placement unless he participated in the competency assessment. Considering his long career, which was satisfactory except for a very short period when he received a negative performance review, the Administration did not make the good faith effort that is required of it to find for the Applicant another posting compatible with his position and experience.

XII. In view of the foregoing, the Tribunal:

1. Orders the Administration to pay compensation for the violation of the Applicant's rights in the amount of 12 months' net base salary at the rate in effect at the time of his separation from service; and,
2. Rejects all other pleas.

(*Signatures*)

Julio **Barboza**
President

Jacqueline R. **Scott**
Member

Dayendra Sena **Wijewardane**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary